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No. 99-424

In the Supreme Court of the United States

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, AND RUSSEL ANDERSON, ETC., PETITIONERS

AND

UNITED STATES OF AMERICA

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

A regulation promulgated by the Department of Justice to implement Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12165, prohibits a "public entity" from placing a "surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by" the Americans with Disabilities Act. 28 C.F.R. 35.130(f). The question presented is:

Whether Congress's general authorization for the promulgation of 28 C.F.R. 35.130(f) reflects a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity from suit, as applied to prohibit a state surcharge for handicapped parking placards.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 166 F.3d 698. The opinion of the district court (Pet. App. A25-A44) is reported at 987 F. Supp. 451.

JURISDICTION

The court of appeals entered its judgment on February 12, 1999. A petition for rehearing was denied on May 11, 1999. Pet. App. A45-A46. On August 2, 1999, the Chief Justice extended the time for filing a petition

until September 8, 1999, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Based on extensive study and fact-finding by Congress,[1] and Congress's lengthy experience with the analogous nondiscrimination requirement in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, Congress found in the Disabilities Act that:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employ-

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[1] Fourteen congressional hearings and 63 field hearings by a special congressional task force were held in the three years prior to passage of the Disabilities Act. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 24-28, 31 (1990); *id.* Pt. 3, at 24-25; *id.* Pt. 4, at 28-29; see also Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the individual hearings). Congress also drew upon reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, *supra*, at 6 (citing United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983); National Council on Disability, *Toward Independence* (1986); and National Council on Disability, *On the Threshold of Independence* (1988)); H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (same).

ment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

* * * * *

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally; [and]

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society[.]

42 U.S.C. 12101(a). Based on those findings, Congress "invoke[d] the sweep of congressional authority, in-

cluding the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. III 1997), addresses discrimination in public accommodations operated by private entities.

This case involves a suit under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).[2] The prohibition on discrimination may be enforced through private suits against public entities. See 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 119 S. Ct. 2176, 2182 (1999). In the Disabilities Act, Congress expressly abrogated the States' Eleventh Amendment immunity

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[2] While the Disabilities Act does not apply to the federal government, substantially similar protections are provided by Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), which has governed "any program or activity conducted by any Executive agency" since 1978. In addition, Congress has extended the obligations of the Disabilities Act to itself. See 2 U.S.C. 1331(b)(1) (Supp. IV 1998).

from private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

Unlike Titles I and III, Title II does not explicitly delineate all the different types of actions that constitute "discrimination." Instead, Congress instructed the Attorney General to issue regulations implementing the provisions of Title II. See 42 U.S.C. 12134(a); see also 28 C.F.R. Pt. 35 (Attorney General's regulations). The Attorney General's regulations, Congress further directed, "shall include standards applicable to facilities and vehicles covered by this part" that are "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board." 42 U.S.C. 12134(c). To ensure that newly constructed facilities are accessible to people with disabilities, the regulations require that, "[i]f parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces * * * shall be provided in each such parking area" in a number proportional to the number of total parking spaces. 28 C.F.R. Pt. 36, App. A, § 4.1.2(5); see 28 C.F.R. 35.151(c) (incorporating standards).[3] Each space must be "designated as reserved by a sign showing the symbol of accessibility." 28 C.F.R. Pt. 36, App. A, § 4.6.4. Accessible parking must also be provided in existing facilities when necessary in order to assure

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[3] 28 C.F.R. 35.151(c) permits public entities subject to Title II to select between these standards and the Uniform Federal Accessibility Standards, 41 C.F.R. Pt. 101-19.6, App. A. With respect to parking requirements, the two sets of standards are virtually identical, see 41 C.F.R. Pt. 101-19.6, App. A, §§ 4.1.2(5), 4.6.

that programs, services, and activities of an entity are accessible to people with disabilities. See 28 C.F.R. 35.150. The regulations additionally direct that a

> public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. 35.130(f).

2. Respondent permits cars to park in parking spaces reserved for "handicapped persons" only if the car has a special license plate or removable windshield placard that indicates that the car is being used to transport a person with a mobility impairment. Pet. App. A4. It is otherwise a crime to park in the spots designated for handicapped persons. See N.C. Gen. Stat. § 20-37.6(e)(1) (1993). Respondent charges no extra fee for the issuance of handicapped license plates, but, consistent with state law, charges a fee of five dollars for a handicapped parking placard, which is valid for five years. Pet. App. A4.

Petitioners are persons with disabilities who paid a five-dollar fee to receive placards so that they could park in accessible parking spaces. Pet. App. A5. They alleged that the fee violated 28 C.F.R. 35.130(f), and sought declaratory and injunctive relief, and a refund of all fees on behalf of themselves and a class of similarly situated persons. *Ibid.*

The district court held that the Eleventh Amendment barred the suit and dismissed the action. Pet. App. A25-A44. The court found that Congress clearly intended to abrogate Eleventh Amendment immunity,

id. at A31, but that Congress lacked the power to do so because Title II of the Disabilities Act exceeded its remedial power under Section 5 of the Fourteenth Amendment. *Id.* at A31-A41.

3. On appeal, the United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Congress's abrogation of the States' Eleventh Amendment immunity.[4] The court of appeals affirmed, but on narrower grounds than the district court. Pet. App. A1-A20. Rather than examine the constitutional validity of Title II as a whole, the court of appeals examined "the legality of the specific statute and regulation whose asserted violation by state government gave rise to the claim for relief in federal court," because "the statute itself—which may speak only in general terms—may be facially constitutional, despite the fact that the regulations promulgated under it are unconstitutional." *Id.* at A11, A12. The court then held that Congress clearly intended in the Disabilities Act to abrogate Eleventh Amendment immunity. *Id.* at A12. But the court determined that, when 28 C.F.R. 35.130(f) "prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, [it] lies beyond the remedial scope of the Section 5 power." Pet. App. A13. This was so, the court reasoned, because Congress had not identified any evidence in the "legislative record" that "state surcharges for handicapped programs are motivated by animus." *Id.* at A18. The court of appeals did not

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[4] Because it found it lacked jurisdiction, the district court did not reach the question whether respondent's placards are "measures * * * required by the [Disabilities] Act" within the meaning of 28 C.F.R. 35.130(f). The United States took no position on the merits of petitioners' claims.

address the validity of the Disabilities Act's abrogation of Eleventh Amendment immunity with respect to any other aspect of Title II. *Id.* at A20 n.*.

Judge Murnaghan dissented. Pet. App. A21-A24. In his view,

> [i]t makes no more sense to allow states to recoup from the disabled the costs of providing the remedial programs needed to fully integrate them into society than it would, for example, to permit universities receiving federal funding to charge women higher tuition rates to cover the costs of complying with Title IX of the Civil Rights Act of 1964. The goal is to help the victims of discrimination, not to heap more discriminatory treatment upon them.

Id. at A24.

ARGUMENT

Petitioners are correct (Pet. 4) that the question whether the Disabilities Act's abrogation of the States' Eleventh Amendment immunity constitutes a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment is an important question and one on which there is a direct conflict in the circuits. Indeed, two petitions are currently pending before this Court in which that question is raised and in which decision of that question would be dispositive of the Eleventh Amendment inquiry. See Supplemental Brief for the United States, *Florida Dep't of Corrections* v. *Dickson*, No. 98-829; Brief for the United States, *Alsbrook* v. *City of Maumelle*, No. 99-423. In each of those cases, we have suggested that the petition for a writ of certiorari be held pending this Court's decision in *United States* v. *Florida Board of Regents*, No. 98-

796, and *Kimel* v. *Florida Board of Regents*, No. 98-791, which cases concern the validity of Congress's abrogation of Eleventh Amendment immunity in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* Within fourteen days of the decision in those cases, the United States has proposed to submit a supplemental filing containing its views, in light of that ruling, as to the appropriate disposition of the pending petitions concerning the constitutionality of the Disabilities Act's abrogation provision.[5]

Similar disposition of the present petition is not warranted, however. This case does not squarely present the broad question of whether the Disabilities Act reflects a proper exercise of Congress's Section 5 power. Rather, it presents only the narrow and relatively infrequently recurring question of whether a particular Department of Justice regulation (28 C.F.R. 35.130(f)), as specifically applied to a limited category of state fees, can validly be enforced against the States in federal court by private parties. Accordingly, further review of this case is not warranted.

1. Petitioners contend (Pet. 10-12) that this Court should grant certiorari to review the conflict in the circuits regarding Congress's power under the Disabilities Act to abrogate Eleventh Amendment immunity. The court of appeals, however, did not decide in this case the broad question on which the courts of appeals are in conflict[6] and of which petitioners seek review.

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[5] Another petition raising the constitutionality of the Disabilities Act's abrogation provision, *DeBose* v. *Nebraska*, No. 99-940, is also pending. The United States has not yet filed its response in that case.

[6] Following this Court's decisions in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), six courts of appeals have held that the abrogation of Elev-

Quite the opposite, the court expressly held only that a particular Justice Department regulation implementing the Disabilities Act, insofar as it prohibits "a modest fee to recover the costs of [the State's] efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power." Pet. App. A13. Indeed, the Fourth Circuit in this case expressly declined to rule on the statute itself, *id.* at A20 n.*, and the Fourth Circuit

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enth Amendment immunity contained in the Disabilities Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. See *Garrett* v. *University of Ala.*, 193 F.3d 1214 (11th Cir. 1999); *Martin* v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999); *Muller* v. *Costello*, 187 F.3d 298 (2d Cir. 1999); *Amos* v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212 (4th Cir. 1999); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); see also *Torres* v. *Puerto Rico Tourism Co.*, 175 F.3d 1, 6 n.7 (1st Cir. 1999) ("we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the provision"). The Seventh Circuit also upheld the Disabilities Act's abrogation prior to this Court's decision in *Flores*, *supra*. See *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997). The question of the continuing validity of *Crawford* is currently pending in *Erickson* v. *Board of Governors of State Colleges and Universities*, No. 95 C 2541, 1998 WL 748277 (N.D. Ill. Oct. 1, 1998), appeal pending, No. 98-3614 (7th Cir.) (oral argument heard Apr. 27, 1999). The constitutionality of the Disabilities Act's abrogation is also pending in a number of cases before the Sixth Circuit, for which a consolidated oral argument was held on October 24, 1999. See, *e.g.*, *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), appeal pending, No. 97-3933. Only the Eighth Circuit, in a sharply divided opinion, has ruled that the Disabilities Act's abrogation provision is invalid. *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (1999) (en banc, with four judges dissenting), petition for cert. pending, No. 99-423.

subsequently *upheld* the Disabilities Act's abrogation of immunity in another Title II case, limiting *Brown* to its facts. See *Amos* v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212, 221 n.8 (4th Cir. 1999). This case thus presents no occasion for the Court to decide whether Title II of the Disabilities Act—as opposed to a particular application of a Justice Department regulation—reflects a proper exercise of Congress's Section 5 power.

2. Nor does the narrower question of whether the individual regulation, 28 C.F.R. 35.130(f), falls within the Section 5 power merit this Court's review, for three reasons.

First, the case presents only the question of whether the regulation *as applied* to the narrow circumstances presented here—"a modest fee to recover the costs of [a State's] effort"—falls within the Section 5 power. The court of appeals eschewed an across-the-board analysis of whether the federal government could, under its Section 5 power, prohibit certain categories of charges for the costs of providing required services to persons with disabilities. See Pet. App. A18 (concluding that "[i]t may well be that some subset of those surcharges is in fact" "motivated by animus toward the class," but finding that rationale inapplicable to "a modest cost-recovery mechanism rationally employed to recoup the costs of programs aimed at assisting persons with disabilities"). The court of appeals' decision thus involved the distinctly limited question of whether a regulation as applied to a particular factual scenario fell beyond the Section 5 power. Such narrow rulings generally do not warrant an exercise of this Court's certiorari jurisdiction.

Second, a necessary antecedent to adjudicating the question petitioners present for review is the non-

constitutional issue of whether, as a matter of regulatory interpretation, parking placards for disabled persons are "required to provide that individual or group with the nondiscriminatory treatment required by the [Disabilities Act]." 28 C.F.R. 35.130(f). That is an interpretive question about which there is substantial debate. Compare *Dare* v. *California*, 191 F.3d 1167, 1172-1173 (9th Cir. 1999), with *id.* at 1177-1181 (Fernandez, J., dissenting).[7] Yet the court of appeals did not address that interpretive issue in its decision. Nor is there any conflict in the circuits on that question that would warrant this Court's review. Petitioners, in fact, do not even present that interpretive question for this Court's review. But "[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Because the petition asks this Court to "anticipate a question of constitutional law in advance of the necessity of deciding it," *id.* at 346, further review should not be granted.[8]

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[7] The Justice Department has not yet expressed a view on the matter.

[8] We recognize that the Court traditionally favors the resolution of jurisdictional questions before the merits of parties' claims are addressed. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-102 (1998). That precept does not translate readily to jurisdictional objections based on the Eleventh Amendment, however, for two reasons. First, as this Court has explained, the Eleventh Amendment does not operate like a traditional limitation on subject matter jurisdiction:

> The Eleventh Amendment * * * does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can

Third, this case presents a potential bar to federal jurisdiction separate and apart from the Eleventh Amendment question presented. The Tax Injunction Act, 28 U.S.C. 1341, denies federal courts jurisdiction over actions to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Respondent argued in both the district court and the court of appeals that the Tax

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waive the defense. Nor need a court raise the defect on its own.

Wisconsin Dep't of Corrections v. *Schacht*, 524 U.S. 381, 389 (1998) (citations omitted); see also *id.* at 394-395 (Kennedy, J., concurring).

Second, in deciding the jurisdictional question of whether Eleventh Amendment immunity has been validly abrogated pursuant to Congress's Section 5 power, the legal test adopted by this Court requires, as a prerequisite, a meaningful analysis of the operation of the Section 5 legislation (or regulation). This is because a valid abrogation requires a clear intent to abrogate and ascertaining that intent requires an interpretation of the statute. See *Seminole Tribe*, 517 U.S. at 55-57. It also requires that Congress possess the power to abrogate, and when that power is asserted under Section 5 of the Fourteenth Amendment, the constitutionality of the abrogation turns upon whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Flores*, 521 U.S. at 520. Especially with respect to statutes (or regulations, like the one at issue here) for which there is no established body of interpretive law to draw upon, it will often be difficult to assess the law's constitutionality—its congruence and proportionality—without first determining the substantive scope of its operation. Indeed, the court of appeals found the Justice Department's regulation to be incongruent and disproportionate—and thus an unconstitutional abrogation of immunity—based solely on the assumption that the regulation embraces the type of placard fees at issue here. See Pet. App. A17-A19.

Injunction Act barred petitioners' federal-court action because the "purpose of the charge for the placard is to raise money to pay for governmental operations through the Highway Fund, rather than recovering specifically the cost of supplying the placard." Resp. C.A. Br. 30-31. While the United States takes no position on the ultimate question of the Tax Injunction Act's applicability,[9] the existence of such a non-constitutional jurisdictional question stands as an additional potential obstacle to the Court's resolution in this case of the constitutional question for which petitioners seek review.[10]

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[9] There is an obvious tension between respondent's characterization of the fee for purposes of its Tax Injunction Act argument as a "revenue generator" whose purpose is *not* to "recover[] specifically the cost of supplying the placard," Resp. C.A. Br. 30, 31, and respondent's characterization of its fee for purposes of its Disabilities Act argument, Br. in Opp. i (fee is imposed "to defray the cost of voluntarily providing 'handicapped' windshield placards").

[10] Moreover, the resolution of petitioners' claims may have little practical impact for them, because they currently have pending a state court action that raises the identical Disabilities Act allegations presented in this case and seeks declaratory and injunctive relief and refund of the collected fees. Although *Alden* v. *Maine*, 119 S. Ct. 2240 (1999), held that Congress's Article I power is insufficient to abrogate the States' sovereign immunity to suits in their own courts, there is a substantial basis to believe that respondent has waived its immunity to such suits. First, as respondent conceded below (Resp. C.A. Br. 31-32), the North Carolina Administrative Procedures Act, N.C. Gen. Stat. § 150B-43 (1995), permits individuals in petitioners' position to challenge the validity of the parking placard fee in state court. In addition, North Carolina has a specific provision that permits a person who pays under protest a "tax" involving motor vehicles to sue in state court for a refund See N.C. Gen. Stat. § 20-91.1 (1993); cf. *Cedar Creek Enters., Inc.* v. *North Carolina Dep't of Motor Vehicles*, 226 S.E.2d

In their supplemental brief, petitioners note that the Ninth Circuit, in *Dare* v. *California*, *supra*, reached the opposite conclusion from the court of appeals here as to whether Congress validly abrogated the States' Eleventh Amendment immunity for suits that challenge parking placard surcharges. The existence of such an inter-circuit conflict, while obviously relevant to this Court's discretionary exercise of its certiorari jurisdiction, does not independently warrant review in this case, both because of the narrow and limited impact of the courts' rulings and because of the other potential procedural and jurisdictional barriers to review discussed above.

Furthermore, the conflict between the Ninth Circuit and the court of appeals' decision here concerns not the broad question of the constitutionality of Title II, or even whether the regulation alone as applied to parking placard fees was a valid exercise of Congress's Section 5 authority, but whether courts should examine the constitutional validity of Title II as a whole or on a regulation-by-regulation basis. Compare Pet. App. A9-A12 with *Dare*, 191 F.3d at 1176 n.7. While petitioners suggest at one point (Pet. 9) that the Fourth Circuit

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336, 338-339 (N.C. 1976) (construing term "tax" broadly so as to apply to a penalty imposed for violating weight limit). While both provisions impose exhaustion requirements before suit can be filed, even if respondents did not comply with those requirements in all respects, they are not jurisdictional and can be waived by the courts when the equities require. See *Bailey* v. *North Carolina*, 500 S.E.2d 54, 74-76 (N.C. 1998) (state law that taxpayers pay the tax under protest and then seek a refund through administrative procedures before suing in state court need not be followed in all respects once notice is achieved); *Huang* v. *North Carolina State Univ.*, 421 S.E.2d 812, 815 (N.C. Ct. App. 1992) (failure to comply with Administrative Procedures Act's exhaustion requirement can be excused).

erred in examining the regulation alone as applied to parking placard fees instead of in the context of the entire statute, their concession (Pet. 10 (emphasis added)) that their claims "hinge on the constitutionality of *both* the statute and the regulation" indicates that the focus of their challenge is not on the Fourth Circuit's approach, but on the result to which it led in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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